STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2003
V PETE CANNON, SR., Defendant-Appellant.	No. 232529 Saginaw Circuit Court LC No. 99-017633-FH ON REMAND

Before: Markey, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), conspiracy to possess with intent to deliver less than fifty grams of cocaine, MCL 750.157a, maintaining a drug house, MCL 333.7405(1)(d), felony-firearm, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to 2½ to 20 years' imprisonment for the conspiracy count and each of the two cocaine counts, 2 years' imprisonment for the felony-firearm conviction, 16 to 48 months' imprisonment for maintaining a drug house, and 15 to 24 months' imprisonment for possession of marijuana.[1] Defendant appeals by right. We affirm.

We initially affirmed defendant's convictions for possession with intent to deliver less than fifty grams of cocaine, conspiracy to possess with intent to deliver less than fifty grams of cocaine and maintaining a drug house arising out of a police raid at a house on North Fifth Street in Saginaw. *People v Cannon*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2002 (Docket No. 232529). However, we found the evidence insufficient to support defendant's convictions for possession with intent to deliver less than fifty grams of cocaine, felony-firearm and possession of marijuana, arising out of a subsequent police raid at a house and garage at another Saginaw residence on Boxwood. *Id.* Unhappy with our split decision, both parties applied for leave to appeal to our Supreme Court. Defendant's application was denied. 467 Mich 953; 656 NW2d 527 (2003). With respect to the prosecutor's application, our Supreme Court entered the following order:

[1] Defendant's sentences were enhanced pursuant to MCL 333.7413(2).

> On order of the Court, the application for leave to appeal from the October 1, 2002 decision of the Court of Appeals is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *People v Hardiman*, 466 Mich 417[, 646 NW2d 158] (2000). [*People v Cannon*, 468 Mich 865; 659 NW2d 230 (2003).]

We begin our reconsideration by reviewing our Supreme Court's decision in *Hardiman, supra*. The defendant in *Hardiman* was convicted of possession with intent to deliver less than fifty grams of heroin and possession of marijuana. *Hardiman, supra* at 419. On appeal, this Court found the evidence insufficient to support the defendant's convictions, but our Supreme Court disagreed. *Id.* The facts of *Hardiman* are similar to the instant case. During the execution of a search warrant at an apartment, the police stopped Ms. Hardiman in the parking lot. *Id.* In a dining room wastebasket, the police found eight plastic sandwich bag corners, which the police testified were commonly used to package illicit drugs. *Id.* at 419-420 n 1. The police found on a nightstand in a bedroom of the apartment a letter addressed to the defendant at the apartment address. *Id.* at 420. The police also found in the bedroom of the apartment:

> . . . six $10 bags of heroin, a $10 bag of marijuana, $130 in cash, an ID card, and a loan payment book belonging to Rodney Crump. Both male and female clothing were found in the bedroom closet, including a blue denim dress that contained forty $10 packs of heroin in the pocket. Four hundred dollars was found in a sock in a dresser drawer. Written correspondence and a telephone calling card belonging to Crump were found in a television stand. Police also found an unpostmarked letter addressed to defendant in the mailbox of the apartment. [*Hardiman, supra* at 420, quoting unpublished opinion per curiam of the Court of Appeals, issued February 6, 2001 (Docket No. 213402).]

The prosecutor theorized at trial that Ms. Hardiman lived in the apartment with Crump, who was convicted in a separate trial, and both jointly possessed the drugs found in the bedroom. *Hardiman, supra* at 420 n 2.

The *Hardiman* Court began its analysis by noting the familiar standard for appellate review of the sufficiency of evidence to sustain a criminal conviction. "Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *Id.* at 421, citing *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999), *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992), and *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). Our Supreme Court found this Court had erred by not viewing all of the evidence, and reasonable inferences from the evidence in the light most favorable to the prosecution. *Hardiman, supra* at 422-423. "'Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.'" *Id.* at 423-424, quoting *People v Konrad*, 449 Mich 263, 273 n6; 536 NW2d 517 (1995). Significantly, the Court held that the rule established in *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), prohibiting use

of an inference built upon another inference to prove an element of a crime, was inconsistent with the Michigan Rules of Evidence. *Hardiman, supra* at 424-428.

> Accordingly, when reviewing sufficiency of the evidence claims, courts should view all the evidence--whether direct or circumstantial--in a light most favorable to the prosecution to determine whether the prosecution sustained its burden. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. In compliance with MRE 401, we overrule "the inference upon an inference" rule of *Atley* and its progeny. [*Hardiman, supra* at 428.]

The *Hardiman* Court, quoting *Wolfe, supra* at 514-515, further reminded appellate courts that only jurors may decide facts, determine the credibility of witnesses and weigh the evidence they have heard. *Hardiman, supra* at 431. The Court cautioned reviewing courts, "it is simply not the task of an appellate court to adopt inferences that the jury has spurned." *Id.* Our task then, in light of *Hardiman,* is to determine whether "all the evidence, direct and circumstantial, as well as all reasonable inferences that may be drawn therefrom, when viewed in a light most favorable to the prosecution, is sufficient to support defendant's conviction beyond a reasonable doubt." *Id*. at 429 (citation and footnote omitted). In *Hardiman,* our Supreme Court concluded that the evidence "when viewed as a whole and in a light favorable to the prosecution, was sufficient to support a finding that the defendant was guilty beyond a reasonable doubt." *Id*. at 431.

We now apply these principles to the case before us. Defendant's convictions resulted from two police raids: one at a house on North Fifth Street and one at a house on Boxwood, both in Saginaw. After a controlled buy at the house, the North Fifth house was raided. The police found suspected cocaine and related paraphernalia in one room, three people in another room, a fourth person in one bedroom, and defendant in another bedroom. Defendant had in his pockets a Veterans Administration card with his name and the Boxwood address on it, a pager, and a Consumer's Energy bill for the North Fifth house in the name of Dameka Woods, defendant's daughter. Woods testified that she owned the house, and it was supposed to be vacant. The police then raided the Boxwood property. There they found a jar containing a large cake-like quantity of cocaine in the garage, a handgun, a rifle, a shotgun, nearly $3,000 in cash, and suspected marijuana in the master bedroom of the house. They also found a tax bill for the North Fifth house addressed to Dameka Woods, a Consumer's Energy bill for the North Fifth house addressed to Pete Woods,[2] a cable television bill addressed to defendant at the Boxwood house, and a photograph of defendant and his girlfriend, Janice Coleman. Coleman was the only person there; she said she was there washing clothes. At the North Fifth house only defendant and Jacqueline Bowdery[3] were arrested and charged.

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[2] The police testified that both defendant and his son, Pete, Jr., went by the last name of Woods.

[3] Bowdery was given a favorable plea agreement and testified for the prosecution.

The elements of unlawful possession with intent to deliver less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv), are: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra* at 516-517. Possession may be either actual or constructive, and may be either joint or exclusive. *Id*. at 520; *Konrad, supra* at 271. "The essential question is whether the defendant had dominion or control over the controlled substance." *Id*., citing *People v Germaine*, 234 Mich 623, 627; 208 NW 705 (1926). Mere presence in the proximity of drugs is insufficient to establish constructive possession, which may be found where the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband to support an inference that the defendant exercised dominion or control over the substance. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002); *Wolfe, supra* at 520-521. Circumstantial evidence and reasonable inferences drawn from it can be sufficient to establish possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Taken in its entirety, the evidence could allow the jury to rationally conclude that defendant was sufficiently in possession and control of the North Fifth house on March 24, 1999, to actually or constructively possess the cocaine found there. *Konrad, supra* at 271; *Fetterley, supra* at 515. Bowdery testified that she believed the North Fifth house belonged to defendant, but he did not live there. She did not know where defendant lived; she would simply page him when she needed more cocaine. When defendant would bring her more cocaine to sell, Bowdery would give defendant the money she received from her cocaine sales. Bowdery's testimony alone, if believed, was sufficient to allow the jury to find that defendant possessed and intended to sell the cocaine. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Although defendant offers reasons to disregard Bowdery's testimony, his contentions address credibility and are not for this Court, or the trial judge to weigh. *Hardiman, supra* at 431; *Heikkinen, supra*. Furthermore, defendant was apprehended at the North Fifth house, possessed a utility bill for the house, and defendant's daughter testified that she had called him and asked him to go to the North Fifth house and get trespassers there to leave. If believed, this evidence provided grounds for a rational jury to infer that defendant exercised dominion and control over the premises and at least joint possession of the cocaine seized there. A police expert provided evidence regarding the weight and identity of the cocaine and testified that the substance seized at the North Fifth house was cocaine and weighed less than fifty grams. Therefore, the jury's conclusion regarding possession with intent to deliver cocaine at the North Fifth house was adequately supported by evidence. *Wolfe, supra* at 515.

The elements of conspiracy to violate MCL 333.7401(2)(a)(iv) are that (1) defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) defendant and his coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Bowdery's testimony that defendant had supplied her with crack cocaine to sell by bringing it to her at the North Fifth house almost daily for several months, combined with the proof of possession with intent to deliver, was sufficient to enable the jury to find defendant guilty of this offense. *Hardiman, supra* at 431; *Heikkinen, supra*.

Similarly, the evidence when viewed in the light most favorable to the prosecutor, was sufficient to support inferences that would justify a rational trier of fact in finding beyond a reasonable doubt that defendant possessed the cocaine and marijuana found at the Boxwood house. *Hardiman, supra* at 428; *Wolfe, supra* at 513-514. The evidence the prosecutor presented showed that defendant possessed a two-year-old Veterans Administration card bearing the Boxwood address, that there was a photograph of defendant and his girlfriend, Janice Coleman at the Boxwood house, and that in the Boxwood house was a utility bill for the North Fifth house in the name of Pete Woods.[4] Although Coleman testified that she and defendant had not lived at the Boxwood address for two years, the credibility of her testimony was weakened because it was inconsistent with her testimony at the preliminary examination. Furthermore, the Boxwood house was furnished and Coleman was doing laundry there when the police arrived. Also, the police found an envelope addressed to defendant at the Boxwood address postmarked July 8, 1998 (eight months before the raid). The police search of the master bedroom at the Boxwood address disclosed a small quantity of marijuana, a rifle and a shotgun in a closet, $2,765 in a shaving kit, $190 lying on top of a television, and a nine millimeter handgun on top of the headboard of the bed. A cable television bill for the Boxwood address in defendant's name, and the energy bill for the North Fifth Street residence in the name of Pete Woods were both found on the kitchen table at the Boxwood home. Finally, the police testified they had observed defendant at the Boxwood residence on a number of occasions. That the handgun was tested for fingerprints, but none were found, and that none of the other physical evidence was tested for fingerprints, does not negate the reasonable inference from the other evidence that defendant was residing at the Boxwood residence. *Hardiman, supra* at 423-424.

Moreover, there was other evidence from which the jury could reasonably infer defendant's connection to the contraband and cash found at the Boxwood residence. The prosecutor presented expert testimony that cocaine dealers often use two locations. This expert testimony when considered with Bowdery's testimony that defendant only provided her a daily sales inventory of cocaine and did not live at the North Fifth residence, and that she gave defendant the cash from her drug sales, would permit a rational jury to infer that defendant stored cocaine and drug profits at some other location, i.e. here, the Boxwood address. In that regard, the police found on Coleman's person when they searched her at the Boxwood residence a marked $20 bill used by the police in a "controlled buy" of cocaine at the North Fifth residence the day before the execution of the search warrants in this case. Further, numbers encoded in the pager that defendant possessed at the North Fifth residence matched numbers encoded into a pager that the police found at the Boxwood residence. Again, this evidence together with other evidence connecting defendant to the Boxwood residence, the large chunk of cocaine (41.72 grams or about 1½ ounces) found in the garage at the Boxwood location, and the substantial sum of cash in the bedroom, would permit a rational jury to infer that defendant was using the Boxwood residence to store his inventory of cocaine and drug profits. Thus, when viewed as a whole and in a light favorable to the prosecution, we conclude there was sufficient evidence is to support a rational jury's finding that defendant was guilty beyond a reasonable doubt as to all of the drug charges. *Hardiman, supra* at 421, 428, 431.

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[4] See n 4.

Based on the evidence already discussed, a rational jury could also infer that defendant possessed the firearms at the Boxwood residence to protect his drugs and his drug profits stored at the Boxwood residence. To be guilty of felony-firearm, a defendant must carry or possess a firearm when committing or attempting to commit a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). "A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it." *Id*. at 439. In *Burgenmeyer, supra,* the drugs and firearm were in close proximity to each other permitting a reasonable inference that the defendant possessed both at the same time. *Id.* at 440. However, the critical question is whether the firearm is accessible to the defendant at the time the drugs are possessed. *Id.* at 438. That is, it is not the proximity of the firearm to the drugs, but defendant's proximity to the firearm that is important: was the firearm accessible to defendant at the time he possessed the illicit drugs? Here, although the cocaine was found in a detached garage at the Boxwood address and the firearms were in the bedroom, the evidence permitted a rational jury to find defendant guilty of constructively possessing the cocaine. Further, the evidence permitted reasonable inferences that defendant resided at the Boxwood residence, kept his drug profits in the bedroom of the Boxwood residence, and had ready access to firearms in the bedroom at the same time he constructively possessed the cocaine in the garage. Accordingly, the evidence was sufficient to allow a rational factfinder to conclude that defendant possessed both the firearms and the cocaine at the same time. *Hardiman, supra* at 421, 428, 431; *Burgenmeyer, supra* at 438, 440.

Defendant's appeal does not substantively contest his conviction for maintaining a drug house, MCL 333.7405(1)(d). A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Furthermore, a review of the record finds no error on this issue. A defendant convicted of this crime must have exercised authority or control over the property for purposes of making it available for keeping or selling proscribed drugs, and do so continuously for an appreciable period. *Griffin, supra* at 32. A person may be deemed to keep and maintain a drug house if that person has the ability to exercise control or management over the house. *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998). In this case, there was evidence that defendant exercised control over the North Fifth house. Bowdery's testimony that defendant had used that house to provide her with drugs to sell over a period of several months provides sufficient evidence to support his conviction. *Heikkinen, supra.*

Finally, defendant argues that the trial court improperly admitted rebuttal testimony. A trial court's decision to admit rebuttal evidence is reviewed for clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The purpose of rebuttal evidence is to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *Id.* at 399, quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947). Rebuttal evidence, however, must relate to a material rather than a collateral, irrelevant, or immaterial matter. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Evidence revealing a witness' bias or prejudice is not collateral, *People v Rosen*, 136 Mich App 745, 758-759; 358 NW2d 584 (1984), and is "almost always relevant," *People v Layher*, 464 Mich 756, 762-765; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984).

Defendant called as a witness an admitted crack cocaine user who was present when defendant was arrested. Her testimony was that she had not seen defendant with drugs the day of the police raid and had not seen defendant give drugs to Bowdery that day. The prosecution then called a detective who testified on rebuttal that (1) defendant's witness had told him she had seen defendant with crack cocaine on multiple occasions, (2) she had seen defendant cutting cocaine at the North Fifth house on the night of his arrest, (3) that Bowdery had obtained her crack cocaine from defendant, and (4) the witness had "taken a case," or accepted blame, in the past for something defendant had done. The first three items in the detective's testimony were proper rebuttal testimony because they directly contradicted the testimony of defendant's witness regarding defendant's possession of cocaine. *Vasher, supra* at 504. The last item was also proper rebuttal because it addressed the witness' potential bias in favor of defendant. *Layher, supra* at 765; *Rosen, supra* at 758-759. Therefore, the trial court did not clearly abuse its discretion in admitting the challenged testimony. *Figgures, supra* at 399.

In conclusion after reconsidering the matter on remand, we affirm all of defendant's convictions.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald